Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77 - 830

EDWIN J. O'CONNOR,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION TWO OF THE STATE OF WASHINGTON

JEROME BERG, ESQUIRE
1255 Post Street, Suite 1010
San Francisco, California
94109
Tel: (415) 775-7751

Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77 -

EDWIN J. O'CONNOR,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

The Petitioner, EDWIN J. O'CONNOR respectfully prays that a Writ Of Certiorari issue to the Court of Appeals, Division Two, of the State of Washington to review the decision affirming the judgment of conviction in the Superior Court for Thurston County.

Judgment was entered, following a jury verdict of guilty, on April 14, 1975.

The Court of Appeals, Division Two, affirmed the judgment by its unpublished opinion filed February 22, 1977. A timely Motion For Reconsideration was filed March 11, 1977 and was denied by order dated March 23, 1977. A timely Petition For Reconsideration To The Supreme Court, State of Washington, was filed on April 11, 1977; the Petition was denied Sep-

tember 29, 1977.

OPINION BELOW

The opinion of the Court of Appeals of the State of Washington appears as Appendix Exhibit A hereto. The order of the Court of Appeals denying the Motion For Reconsideration appears as Appendix Exhibit B hereto. The order of the Supreme Court of the State of Washington denying the Petition For Review appears as Appendix Exhibit C hereto.

JURISDICTION

The denial of Petitioner's Petition For Review To The Supreme Court of the State of Washington was entered September 29, 1977. This Petition has been filed within 90 days thereof. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I

Is there probable cause for issuance of a warrant to search a residence for controlled substances in an affidavit based on information from an unnamed informant that provides no personal and recent information regarding the premises to be searched?

II

When oral information is required to supplement an affidavit for a search warrant does the testimony of the issuing magistrate at a suppression hearing

two months later, recalling only that a second, unnamed informant was mentioned, provide a sufficient basis to validate an otherwise insufficient affidavit?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provisions involved is the Fourth Amendment, made applicable to the states by the Fourteenth, which provides:

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

HISTORY OF THE CASE

On the evening of June 27, 1974 Officer William Strand of the Thurston County Sheriff's Department, State of Washington, prepared an affidavit for a warrant to search Petitioner's residence and pickup truck for controlled substances. Appendix Exhibit D. The affidavit contained only the following statement:

> *"Information was transmitted to this officer by a confidential and reliable informant that he personally observed a controlled substance that was*

> *removed from the above named residence. At the time an estimate of perhaps a thousand or more pills were in the residence. The informant is aquainted with drugs both pharmaceutical-type and illicit drugs. The informant is licensed as a pharmacist. The controlled substance is identified as methanphetamine (Criss-Cross Speed) Further it was noted that the suspect took a package that appeared to be some of the same type substance to his vehicle. The informant has in the past aided in the investigation of other cases that have resulted in the arrest and conviction of the persons involved in the cases. The informant is still being used as an informant and will be used in the future in drug abuse cases."*

Officer Strand consulted with the Assistant District Attorney, Mr. Schaller, Jr., who pointed out deficiencies in the affidavit which would require supplementary, oral information to the magistrate. That evening Officer Strand sought out and located Judge Pro Tem Ward Rathbone at a local restaurant and bar. Judge Rathbone was paged and the two men went to the cash register area where the affidavit was read and supplementary oral information given. There were no witnesses to the conversation. No court reporter was present. No recording was made. No notes of the conversation were made at the time, or thereafter. Judge

Rathbone signed the Warrant.

That same night, at 11:30 p.m., a search was conducted at Petitioner's residence. A quantity of pills was found in the front room of the apartment and in the kitchen cabinet. Analysis by a forensic chemist revealed that the contents of some of the pills were amphetamines.

HISTORY OF THE PROCEEDINGS

Petitioner was charged by information with two counts of possession and one count of delivery of amphetamines. At a suppression hearing held August 28, 1974 Judge Rathbone testified that just prior to signing the search warrant he swore Officer Strand under oath and the Officer told him there was another informant in addition to the one referred to in the affidavit. Judge Rathbone did not recall any other specific information conveyed orally. Officer Strand testified that he told Mr. Rathbone the information from the unnamed informant had been received at 6:00 p.m. that same day, and that there was a second informant but he did not wish to include that second informant in the affidavit. The Trial Court concluded that probable cause existed for the issuance of the search warrant. Testimony regarding the amphetamines seized in the search was central to the prosecution's case. The jury returned guilty verdicts on all three counts.

The Court of Appeals in its unpublished opinion (Appendix Exhibit A) sidestepped the major issue of the use of

oral information to supplement the affidavit by finding that the affidavit itself established probable cause.

REASONS FOR GRANTING THE WRIT

I. AN AFFIDAVIT FOR SEARCH WARRANT, BASED ON INFORMATION FROM AN UNNAMED INFORMANT, THAT IS DEVOID OF ANY DESCRIPTION OF THE INTERIOR OF THE PREMISES, OR OF A STATEMENT THAT CONTROLLED SUBSTANCES WERE THERE OR OF THE PROCEDURES WHEREBY SUCH SUBSTANCES ARE TRANSPORTED IN AND OUT OF THE PREMISES, DOES NOT PROVIDE PROBABLE CAUSE FOR THE SEARCH OF A RESIDENCE

The Fourth Amendment to the Constitution requires that probable cause be shown before a search warrant is issued. When an affidavit for search warrant is based on hearsay it must satisfy the two-pronged test of Aguilar v. Texas (1964) 378 U.S. 108. First, the magistrate must be informed of some of the underlying circumstances on which the informant based his conviction that drugs were where he claimed they were. Second, the officer must state the facts from which he concluded that the informant was reliable. If the affidavit appears insufficient at first glance because either of these criteria has not been met, probable cause may still be established if the affidavit recites corroborating evidence which buttresses either the informant's reliability or the reliability of his information. Spinelli v. United States (1964) 393 U.S. 410.

In the instant case, reliability of one of the informants only was established in the affidavit. That unnamed informant

was identified as a licensed pharmacist, familiar with illicit drugs, who had aided in previous investigations leading to arrest and conviction. Nothing is known about the unidentified informant who was mentioned in the course of the suppression hearing.

It is clear from case law that the other prong of the test requires personal and recent observations of the premises to be searched. For example, an affidavit cited with approval by the Court in Aguilar appears in Jones v. United States (1960) 362 U.S. 257. The Jones informant had on many occasions been at the subject apartment and purchased narcotics there from the tenant, most recently on the day before the affidavit was made. He knew the tenant kept the narcotics in one of the following locations when not on his person: under a pillow, on a dresser or on a window ledge of the apartment.

In United States v. Harris (1971) 403 U.S. 573 the adequate affidavit stated that informant had purchased illegal whiskey within the residence described for a period of more than 2 years, most recently within the past 2 weeks prior to the date of the affidavit, and he knew of a person who bought illegal whiskey there within the past 2 days.

United States v. DiMuro (1st Cir. 1976) 540 F.2d 503 is a recent illegal gambling case. According to the affidavit the informant had recently placed bets over the telephone at the location to be searched and had observed gambling records there. United States v. Tellis (6th Cir. 1976)

538 F.2d 1254 presents a minimally sufficient affidavit for a drug search: The informant had been on the premises to be searched within the past 3 days and had seen a white powder which the defendant told him was heroin.

In the instant case there are no statements of personal and recent observations of the premises to be searched. What the informant claimed to see was a controlled substance "that was removed from the above named residence." That statement is obviously ambiguous, but on a fair reading it gives no indication that the informant ever saw the drugs in question in the possession of the Petitioner or at his residence. It merely says that the controlled substance had been removed from that residence. How removed, by whom or when are questions that seek an answer in the record in vain. The attempt in the affidavit to connect the drugs to Petitioner's pickup truck is equally defective. It was noted "that the suspect took a package that appeared to be some of the same type substance to his vehicle." The statement itself is qualified; not a fact, but an inference, a guess is reported without further detail as to the package - its shape, size, color, markings, or whether it was open so that pills were visible within. Corroboration of innocuous or marginal information does not satisfy the Aguilar-Spinelli test. See United States v. Larkin (9th Cir. 1974) 510 F.2d 13, and the dissenting opinion of Leventhal, Circuit Judge, in United States v. Myers (D.C. Cir. 1976) 537 F.2d 424.

II. A MAGISTRATE'S RECORD OF SUPPLEMENTARY ORAL INFORMATION WHICH CONSISTS SOLELY OF HIS RECOLLECTION AT A SUPPRESSION HEARING THAT THERE WAS A SECOND UNNAMED INFORMANT IS NOT SUFFICIENT TO SALVAGE AN INADEQUATE WRITTEN AFFIDAVIT FOR SEARCH WARRANT

The question whether sworn oral testimony given to a state magistrate in an application for a search warrant could be considered in order to support an insufficient affidavit was presented to this Supreme Court in a Petition For Certiorari from a ruling of the Supreme Court of the State of Washington which answered the question in the affirmative in State v. Chakos (1968) 74 Wash.2d 154, 443 P.2d 815 based on that Court's prior holding in State v. Walcott (1967) 72 Wash.2d 959, 435 P.2d 994. This Supreme Court denied certiorari, over the dissent of Mr. Justice Brennan, joined in by Mr. Justice Marshall. Christofferson v. Washington (1969) 393 U.S. 1090.

The Washington decisions require that when oral testimony is taken the guarantees of a signed affidavit must have reasonable replacements. In State v. Malbeck (1966) 69 Wash.2d 695, 419 P.2d 805, the officer was sworn by the magistrate and examined under oath as follows:

> *" ... the justice read the affidavit form and then asked him questions regarding the appellant's name on the documents, as to the past reliability of the informant, as to how long the officer had dealt*

> *with the informant, ... as to the location where the stolen property was believed to be kept, and as to the informant's knowledge of the area of the (offense)."*
> 69 Wash.2d at 696, 697

Thereafter the magistrate executed an affidavit regarding his examination. Thus two additional guarantees of probable cause were provided -- an extensive oral examination and a written affidavit describing it.

In Walcott, supra, no record of the oral testimony was made at the time of the application for search warrant. However, in preparation of a suppression hearing four affidavits were obtained -- one from the magistrate, one from the deputy prosecuting attorney, one from the complaining officer, and one from another police officer -- purporting to relate in detail what was said to the magistrate.

By order dated April 18, 1973, effective July 1, 1973 the Supreme Court of the State of Washington adopted Justice Court Criminal Rule 2.10(c) which requires, in pertinent part, that if oral testimony is required in support of a search warrant affidavit, "The judge shall record a summary of any additional evidence on which he relies." The entire rule appears at 82 Wash.2d 1178. The rules enunciated by that Supreme Court for issuance of search warrants supersede the statutes on the same subject matter. State v. Fields (1975) 85 Wash.2d 126, 530 P.2d 284. This is true in particular of Justice Court Criminal Rule 2.10. City

of Tacoma v. Duane (1976) 15 Wash.App. 698, 552 P.2d 1068.

Rule 2.10(c) was in effect at the time warrant in the instant case was issued, but no recording was made of the oral testimony to Judge Rathbone; no notes were taken; no affidavits regarding that testimony were later prepared. Thus there were none of the reasonable replacements established by Washington case law and Court rule to substitute for the traditional guarantees of a complete affidavit which can later be subjected to constitutional scrutiny.

The nearly unanimous view in the federal courts is that the Fourth Amendment requires only that a defendant be given an opportunity to examine the magistrate and officers to determine the substance of the oral testimony and whether that testimony was given under oath. United States v. Hill (5th Cir. 1974) 500 F.2d 315; United States Ex Rel. Gaugler v. Brierly (4th Cir. 1973) 477 F.2d 516.

Even under this restricted, federal test the instant proceedings were insufficient since by the time of the suppression hearing the substance of the oral testimony was not remembered except for some innocuous details.

CONCLUSION

For all of the foregoing reasons the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

JEROME BERG
1255 Post Street, Suite 1010
San Francisco, California
94109

Attorney for Petitioner

EXHIBIT A

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,)
)
Respondent,)
)
v.)
)
EDWIN J. O'CONNOR,)
)
Appellant.)

NO. 1838-II
Division Two
Unpublished Opinion
Filed Feb 22 1977

REED, J. -- Defendant Edwin J. O'Connor appeals from his superior court convictions for: (1) possession of amphetamines with intent to deliver on June 25, 1974; (2) delivery of amphetamines on June 25, 1974, and (3) possession with intent to deliver amphetamines on June 28, 1974. We affirm.

On June 27, 1974, Detective William Strand of the Thurston County Sheriff's Department, met with a confidential and reliable informant, who told him that he had personally observed a controlled substance which had been removed from the residence of defendant O'Connor and that at that time he estimated there to be perhaps a thousand or more pills in the

residence. The informant also noted that the suspect, O'Connor, had taken a package of what appeared to be the same type substance to his vehicle. Detective Strand then typed a Complaint for Search Warrant, which contained substantially the same information he had received from the informant, and included the additional information that the informant was licensed as a pharmacist, was acquainted with both pharmaceutical and illicit drugs, had identified the controlled substance as methamphetamine ("crisscross speed"), had in the past aided in the investigation of other drug cases which resulted in convictions, and was currently being used as an informant in drug abuse cases.

After some attempts to locate a magistrate, the officer contacted District Court Judge Pro tem Ward Rathbone at a local restaurant late in the evening. Judge Rathbone administered an oath to Detective Strand, questioned him on the contents of the sworn affidavit, and concluded that there was probable cause to believe there were amphetamines in the residence of the suspect at the time. He accordingly issued a search warrant for O'Connor's residence. Detective Strand then proceeded to the suspect's address and conducted a search of the premises, finding and seizing an estimated 6,000 pills from a coffee table near the front door, and more pills from various other locations in the residence. Two suppression hearings were held, at which the existence of probable cause for issuance of the warrant was unsuccessfully attacked and the evidence was used to convict O'Connor at his subsequent trial.

The defendant has made two assignments of error, contending: (1) that the evidence should have been suppressed because (a) the affidavit for the search warrant did not satisfy constitutional standards, (b) the use of oral information to supplement the affidavit was improper, and (c) there was no justification for a nighttime search of the defendant's residence; and (2) that the jury was improperly instructed on the law of possession.

Turning to the issue of probable cause for the issuance of a search warrant, we first note that, although the affidavit is not a model of clarity, it does satisfy constitutional standards and meets the dual test of Aguilar v. Texas, 378 U.S. (1964). It sufficed to furnish probable cause to believe the pills were controlled substances; that they had been observed in the suspect's house in numbers estimated at over 1,000; and the suspect had been seen carring a package which appeared to contain some of the pills to his automobile. The affidavit also contained information from which the issuing magistrate could determine the informant was credible and reliable; he had previously aided in the investigation of cases which resulted in convictions; he was still being used as an informant; and he was a licensed pharmacist. The affidavit

clearly passes the test enunciated in State v. Harrison, 5 Wn. App. 454, 458, 488 P.2d 532 (1971).

Because we have found the affidavit established probable cause, we do not deem it necessary to address defendant's complaint that Officer Strand orally supplemented the affidavit in his discussions with the issuing magistrate. Any error arising from a failure to record and reduce to writing this supplemental information pursuant to the provisions of JCrR 2.10(c) is not prejudicial because the added information would be mere surplusage to an otherwise valid affidavit.

We find no merit in defendant's allegation that there was no justification for serving the search warrant at 11:30 at night. Detective Strand received information from the informant at 6 p.m. on June 27. He immediately typed his Complaint for Search Warrant and attempted to locate a magistrate. After several unsuccessful attempts, he finally located Judge Rathbone in a restaurant at approximately 11 p.m. Upon receiving the search warrant from the judge, he proceeded immediately to the suspect's residence and carried out the search. At the time the search was actually carried out the suspect was not even home, and the police had to be let into the residence by the

apartment manager. JCrR 2.10(c) and CrR 2.3(c) both specify that the "warrant may be served at any time" within 10 days of issuance. Moreover, it is obvious that Judge Rathbone, in signing the warrant at 11 p.m., knew that it might well be executed before daylight. There was no error in serving the warrant. See State v. Smith, 15 Wn. App. 716, 552 P.2d 1059 (1976).

Defendant has failed to preserve error with regard to his contention that the court should not have given its instructions No. 11 and 13. Defendant failed to call to the trial judge's attention the deficiencies he now urges on appeal. State v. Peterson, 73 Wn.2d 303, 438 P.2d 183 (1968); State v. Smith, 11 Wn. App. 216, 521 P.2d 1197 (1974). Nor has defendant complied with CAROA 43, which mandates that we not consider assignments directed to the sufficiency or insufficiency of instructions which are not set out in full in defendant's brief. Accordingly, even though we believe instruction No. 13 is a misstatement of the law and ought not to be given, we do not find it violates any constitutional right of the defendant in the context of this case and there is no ground for reversal.

Defendant assigns no error to the sufficiency of the evidence or the rulings of the trial court in connection with his conviction for delivering amphetamines on June 25, 1974; all assignments appear to be directed at the crimes of possession and particularly that of June 28, 1974.

The judgments are affirmed.

Pursuant to RCW 2.06.040 as amended by the Laws of 1971, ch. 41, §1, this opinion will not be published.

/s/ REED, J.

WE CONCUR:

/s/ PEARSON, J.

/s/ PETRIE, C.J.

EXHIBIT B

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON,

Respondent,

v.

EDWIN J. O'CONNOR,

Appellant.

NO. 1838-II

ORDER DENYING MOTION
FOR RECONSIDERATION

The court has considered this motion for reconsideration and has determined that it should be denied. Accordingly, it is

ORDERED that the motion is denied.

DATED this 23rd day of March 1977.

/s/
CHIEF JUDGE

EXHIBIT C

THE SUPREME COURT OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

EDWIN J. O'CONNOR,

Appellant.

NO. 44886 (1838-II)

ORDER DENYING PETITION
FOR REVIEW

The Court having considered the petition for review of the decision of the Court of Appeals in this cause.

It is ordered that the petition be and it is hereby denied.

Dated this 29th day of September, 1977.

By the Court:

16 Wn. App. 1048 /s/
Chief Justice

EXHIBIT D

THURSTON COUNTY DISTRICT JUSTICE
COURT, THURSTON COUNTY, WASHINGTON

COMPLAINT FOR SEARCH WARRANT
(Controlled Substances)

STATE OF WASHINGTON)
) ss. NO._____
County of Thurston)

COMES NOW William Strand, who being first duly sworn on oath complains, deposes and says:

That he has probable cause to believe and in fact does believe that, in violation of the laws of the State of Washington, controlled substances, as defined by law are being used, manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of or kept, in, about and upon certain premises with Thurston County, Washington, designated and described as follows, to wit:

Apartment 102 of the El Rio Vista Apts. 1275 So. 2nd. Ave. Tumwater Wash. Apartment occupied by ED O'CONNOR also a green Datsun pickup truck with Nev. lic.

That affiant's beleif is based upon the following facts and circumstances:

Information was transmitted to this officer by a confidential and reliable informant that he personally

observed a controlled substance that was removed from the above named residence. At the time an estimate of perhaps a thousand or more pills were in the residence. The informant is acquainted with drugs both pharmaceutical type and illicit drugs. The informant is a licensed pharmacist. The controlled substance is identified as meth anphetamine (Criss-Cross Speed). Further it was noted that the suspect took a package that appeared to be some of the same type substance to his vehicle. The informant has in the past aided in the investigation of other cases that have resulted in the arrest and conviction of the persons involved in the cases. The informant will be used in the future in drug abuse cases.

/s/ William Strand

SUBSCRIBED AND SWORN TO before me this 27 day of June, 1974.

/s/ Ward Rathbone

RECEIVING OF COMPLAINT and ISSUANCE OF WARRANT APPROVED:

SMITH TROY, Prosecuting Attorney

by: /s/
Deputy Prosecuting Attorney